No. 13027

United States Court of Appeals
For the Ninth Circuit

CATHERINE HEIN, *Appellant,*

— vs. —

JOHN R. CRANOR, Superintendent of the Washington State Penitentiary at Walla Walla, Washington, *Appellee.*

APPEAL FROM JUDGMENT OF THE DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

The answering brief of appellee makes two contentions that call for reply. These are, that the district court had no jurisdiction to hear this case; and that Richard Hein is guilty, and that no perjury was committed at his trial. It is significant that no attempt is made to answer appellant's main contentions: that Exhibit "H" is inherently worthless; and that it was taken from the accused by force.

I.

State Remedies Have Been Exhausted, and No Further Right Exists to Apply for Relief in the State Courts.

A. The decision of the Washington Supreme Court is *res judicata* of petitioner's claims in the state courts.

Appellee advances the argument that notwithstanding the decision of the supreme court in *Hein v. Smith*, 35 Wn.2d 688, 215 P.2d 403, another hearing

would be allowed upon a second petition in the state court. He says, "There is no question but that the Washington Supreme Court does grant hearings upon successive applications for *habeas corpus*" (p. 20).

This is not the law of Washington.

> *In re Clifford*, 37 Wash. 460, 79 Pac. 1001, 107 Am. St. Rep. 819;
>
> *In re Graham*, 7 Wash. 237, 34 Pac. 931;
>
> *In re Foye*, 21 Wash. 250, 57 Pac. 825;
>
> *Ex parte Emich*, 124 Wash. 401, 214 Pac. 1043;
>
> *Voight v. Mahoney*, 10 Wn.2d 157, 116 P. 2d 300.

In the *Clifford* case a decree of adoption was attacked by habeas corpus. In an opinion written by Judge Rudkin, the court held that an order dismissing the proceeding, after a hearing and the entry of findings, was *res judicata* of subsequent proceedings involving the same parties and the same facts. In the *Graham* case, it was held that a judgment in habeas corpus was reviewable; consequently, the judgment of an inferior court, from which no appeal was taken, was final and binding, and the petitioner could not address a second petition to another court or judge. The court said:

> "The object in giving every judge in the state original jurisdiction, no doubt, was to place the remedy within easy reach of the applicant and insure him speedy relief when he was entitled to such; and not to give him a multiplicity of trials. It is true that in some of the states the practice is different; but such practice does not commend

itself to our judgment, and we cannot follow it. When one trial has been accorded the petitioner he has secured all the rights which the law has guaranteed him."

In the *Foye* case, it was contended that no appeal would lie in Washington from an order dismissing a petition for habeas corpus, because successive applications could be made and, therefore, the doctrine of *res judicata* did not apply. But the court, while conceding that while perhaps a majority of courts held this view, refused to adopt it; and held that a judgment in *habeas corpus*, like any other judgment, was appealable and, consequently, a final judgment in *habeas corpus* was *res judicata.*

Voight v. Mahoney, 10 Wn.2d 157, 116 P.2d 300, *supra,* is cited in appellee's brief (p. 20). It was a second proceeding in habeas corpus by a prisoner in the penitentiary. The prisoner was serving a life sentence and had sought a writ in 1924, *In re Voight*, 130 Wash. 140, 226 Pac. 482. The grounds of both petitions were the same, *i.e.*: that the trial court lacked jurisdiction because a jury was not empanelled to try the first-degree murder charge. In the first case it had been held that the judgment, while irregular, was not void; and in the second, decided in 1941, it was held that the determination of that case controlled the second proceeding. The reason for considering the second petition was that new grounds were alleged to have arisen.

It is apparent, in light of these authorities, that another proceeding in the state court would not be proper, and would not be entertained.

It is not correct that the Washington supreme court, or the trial courts, entertain successive applications for habeas corpus. The decisions cited on page 20 of appellee's brief do not support this view. Nor do the Washington courts allow successive applications as a matter of practice. Quite the contrary; the presentation of successive applications would be deemed frivolous, and a trifling with the court. The district judge, although requested by appellee to make a finding that successive applications could be made, refused to do so.

There is no need to discuss the "exceptional-cases-of-peculiar-urgency" doctrine. It was pointed out in our brief (p. 64) that the doctrine was laid down in a case where the petitioner had not exhausted his state remedies, and that it was held by the Supreme Court not to be applicable in a case like this. *Ex parte Hawk*, 321 U.S. 114. The "exceptional circumstances" doctrine is invoked only to justify a departure from the rule requiring exhaustion of state remedies; and the quotation in appellee's brief (p. 23) that, "the exceptions are few, but they exist," from *Darr v. Burford*, 339 U.S. 200, 210, has application only to such a situation. In *United States ex rel. Cook v. Dowd*, 180 F.2d 212 (7 Cir. 1950) the court said:

> "If the quotation ('rare cases' presenting 'exceptional circumstances of peculiar urgency') states a rule, it is not applicable here where there has been an exhaustion of state remedies."

Appellee quotes on page 22 of his brief from a note in 61 Harvard Law Review 668. But he has misread

the author's intention. In the same note on page 673 we read:

> "And if state habeas corpus proceedings, usually including attempted certiorari, have been exhausted without success, federal habeas corpus may be invoked to bring the problem directly to the attention of the federal courts."

The suggestion that *corom nobis* ought to be tried shows a lack of knowledge of local practice. In 1947 the Washington legislature provided a corrective process to meet the Supreme Court's requirements. It was an amendment to the *habeas corpus* statute, and permits a review where it is alleged that federal constitutional rights have been violated. Sec. 1075, Rem. Rev. Stat. Prior to the amendment no inquiry would be permitted where the judgment was "regular and fair on its face." *In re Grieve*, 22 Wn.2d 902, 158 P.2d 73. Since the enactment of the 1947 statute the proper remedy in a case like this has been *habeas corpus.*

The last case involving *corom nobis* (and they were rare before that) is *State v. Williams*, 30 Wn.2d 18, 190 P.2d 734. It was commenced before the 1947 statute. The writ was denied but the Chief Justice in a separate concurring opinion remarked:

> "* * * I wish to point out that the writ of *corom nobis* has never been held to lie in this state."

It is proper to point out here that the Supreme Court relies upon the district judge in matters of local practice. See the opinion of Mr. Justice Frankfurter in *Darr v. Burford*, 339 U.S. at 230-231. His consid-

eration of the case and allowance of this appeal are sufficient warrant that no further state remedies are available.

B. This proceeding is a proper resort to federal habeas corpus.

Notwithstanding he quotes the Act of Congress, which expressly authorizes this application (p. 18), appellee argues that the petition for *habeas corpus* should not have been entertained. He bases his point on Judge Parker's dictum in 7 Fed. Rules Dec. 171-178. But he misconstrues the article. As pointed out above, the Washington court would not permit successive applications, and the assumption that successive applications may be made lies at the base of the learned jurist's reasoning.

Where the Supreme Court has had an application for certiorari before it and has denied it, and no other state remedy is available, the petitioner may proceed in the district court, otherwise he would be left remediless. For rights arising under the Constitution of the United States are a matter of Federal law, although they are equally enforceable in the state courts.

No jurisdictional problem is involved. Congress has expressly conferred jurisdiction where state remedies have been exhausted, or where resort to state remedies has failed to vindicate the federal right claimed.

The recent decision in *Darr v. Burford*, 339 U.S. 200, affirms these principles; a few quotations will suffice. The majority said:

"Even after this court has declined to review

a state judgment denying relief, *other federal courts have power to act* on a new application by the prisoner." (p. 215) (Italics supplied)

"Even if the District Court may disregard our denial of certiorari, the fact that power to overturn state criminal administration *must not be limited to this court alone* does not make it less desirable to give this court an opportunity to perform its duty of passing upon charges of state violations of federal constitutional rights." (p. 216) (Italics supplied)

The minority, of course, felt that no consideration whatever should be given to the denial of certiorari. And evidently with Judge Parker's discussion in mind, they said:

"Nor would it be more respectful to the dignity of a State court for the District Court to disagree with the State court's view of federal law if such disagreement came after the court had denied certiorari rather than before.'" (p. 228)

In another place they said: :

"If the petition (for certiorari) is granted and the state's view of his federal claim is sustained here, he may still sue out a writ in the District Court." (p. 224)

Resort has been had to state process but contentions concerning the confession have been ignored. No one questions the competency of the state courts to pass upon constitutional questions. But when a prisoner says that his rights under the Constitution have been disregarded and his liberty has been taken, it is not improper for him to appeal to the national government, and to the judges who serve thereunder

and who are especially charged to vindicate such rights, and ask to be heard. Respectful attention will be given to the state court's judgments, but they will not be allowed to control.

II.

The Trial of Richard Hein Was Tainted by Perjury Deliberately Contrived by the Prosecuting Officials.

A. The affidavit of Joe Jensen of August 4, 1949, was disregarded by the district judge, and it should not be considered on this appeal.

In two places in their brief counsel for appellee mention this affidavit, and ask this court to find there was no perjury at the trial of Richard Hein. On page 16 they say Jensen's subsequent affidavit admits he told the truth at the trial and not at the state *habeas corpus* hearing. Again, on page 27, they say that the affidavit found in the mandamus proceeding on file herein shows that he told the truth at the trial, and they refer to Judge Driver's letter to counsel.

This affidavit was obtained by the deputy prosecuting attorney who is assisting in this appeal, from this 17-year-old boy while in custody (See affidavits (R. 539-543) which are not controverted). It was never brought before any court. It was impossible for appellant to meet it in the district court because the whereabouts of Jensen were then unknown. For this reason his affidavit was not admissible evidence under 28 U.S.C.A., Sec. 2246. *Walker v. Johnston*, 312 U.S. 275, 286. When these facts were called to the attention of the district judge he said he would dis-

regard Jensen's affidavit so far as making any finding on the issues was concerned (R. 519). No finding was made concerning it.

Joe Jensen, apparently in mortal fear of his captors, told a story on the witness stand that convicted Richard Hein. The testimony was skillfully contrived, *e.g.*: the question which elicited the damaging testimony was whether the witness had a conversation with Richard "around" November 17, 1947. (The body was discovered the 18th.) Sitting under the protection of the court in the state *habeas corpus* hearing, he told the truth. As soon as the case was over, the authorities picked him up again, pretending he was a vagrant. Again placed in fear, it appears he might have signed a statement prepared by them, recanting his sworn testimony. This statement, with the supposed verification of the deputy prosecuting attorney who is assisting in this case, was never brought to the attention of trial judge, and was never a part of the record. In fact, it has never been subjected to judicial scrutiny (R. 541). It is not proper to ask this court to consider it for the first time.

III.

Guilt or Innocence of the Accused

A. There was no evidence to convict petitioner's son.

Appellee argues (p. 31) that the jury verdict forecloses the question of guilt or innocence. Ordinarily, guilt or innocence is no concern of the court in the consideration of a habeas corpus application. *Moore v. Dempsey*, 261 U.S. 86, 88. But the conviction here

rests upon the proposition that he confessed; and in resolving that point we are entitled to take into account all the circumstances, including his state of mind generated by his acts. And if corroboration is required —and it seems under all the authorities that it is, *Warsower v. United States*, 312 U.S. 342—the evidence outside the confession should be taken into account.

The possession of money is the only circumstance which appellee can point to with confidence. The boy explained how he got the money; he said Oscar Magnuson gave it to him (R. 279). Magnuson denied this (R. 279-310). But Magnuson had been arrested and held in jail for this crime (R. 311-314). And he appeared to be a police character (R. 307), and thoroughly unreliable. See R. 105.

It is going pretty far to say that a boy should be convicted of murder because we are not satisfied with his explanation of how he got a sum of money. The imputation of perjury is to be avoided. Moore on Facts (1908) Vol. 1, p. 185, Sec. 138. Improbability is sometimes a badge of veracity. Idem, Vol. II, p. 1199, Sec. 1061. A liar would not invent an improbable sounding story—or one almost certain to be contradicted—when one more inherently reasonable would serve his purpose. *Graham v. Graham*, 50 N.J. Eq. 701, 25 Atl. 358.

When Joseph's brethren returned to their father and told him that Joseph was yet alive and governor over all the land of Egypt, "Jacob's heart fainted, for he believed them not." Gen. 46:26.

The suspicious mind can find evidence of guilt in every innocent act and gesture. When the officers set out to prove that the so-called confession was real they were able to build a case—what the prosecutor termed a "*prima facie*" case (R. 469). Children, with their love of the marvellous, their awe of authority coupled with a desire to be helpful, and their amenability to suggestion, formed ready instruments for the official designs. Inez Pitzer's story that the boy told her about the murder before it appeared in the paper is thus accounted for. This actually happened on Wednesday, as the boy testified (R. 262).

Appellee says that some of the points argued in the opening brief are urged for the first time on this appeal. This is not correct. The question of a fair trial—which, after all, is the important thing in any case of this kind: *Adamson v. California*, 332 U.S. 46—was before the state court and the district judge; and all questions relating to it were involved, and were argued.

CONCLUSION

The judgment of the district court should be reversed with directions to grant the writ.

Respectfully submitted,

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